In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 457

JAMES E. IVEY, STEPHENSON ALEXANDER PRICE, CLARENCE HOPE NEWLIN, JR. and THERON ROYCE LOCKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 346 F. 2d 157.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1965. A petition for rehearing was denied on July 14, 1965. The petition for a writ of certiorari

was filed on August 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, at a trial for conspiracy to transport in interstate commerce goods taken by fraud, it was error to admit, as bearing on intent, evidence of similar transactions.

STATEMENT

Petitioners were convicted in the United States District Court for the Middle District of Georgia of conspiring to transport in interstate commerce goods of a value of more than $5,000 which they knew had been taken by fraud. See 18 U.S.C. 371, 2314. Clarence Newlin, Jr. was sentenced to imprisonment for two years, and the others to imprisonment for two and one-half years. The court of appeals affirmed the convictions *per curiam*.

1. The evidence showed that on October 3, 1962, petitioner Ivey opened a bank account in the name of Atlantic Export Company at the Commercial Bank in Crawford, Georgia with a $10,000 cash deposit. Ivey was accompanied by Clarence Newlin, Jr. Ivey explained to the banker that he was buying eggs for export, and that, since he wanted to have an opportunity to inspect the eggs before paying for them, he did not want any drafts charged to the Atlantic Export account.[1] For this reason, when drafts for eggs

[1] In contrast to checks, a bank does not charge a draft to a customer's account until he approves it (R. 127).

arrived at the Commercial Bank, the bank was to notify Ivey who would bring over a check on the Atlantic Export account in payment of the draft (R. 35-37, 46). From October to November 10, 1962, about 20 drafts were handled in this fashion (R. 39, 45-46). The company's bank balance was $19,383.44 on November 14 (R. 109).

On November 14 and 15, Newlin, Jr., using the name Smith, and identifying himself as a buyer for Atlantic Export, arranged for the purchase of two loads of eggs from a Mr. Kottler in Cleveland (R. 51-64). He gave Kottler two drafts totalling $17,550 drawn by Atlantic Export on the Commercial Bank of Crawford (R. 60). The eggs were shipped out on the 15th and 16th (R. 63-64), but the drafts were never paid (R. 66-67). On November 19, before the arrival of Kottler's drafts, petitioner Price, using the name Pierce, withdrew $17,550 from the Atlantic Export account. He said he was going to deliver the cash to Cleveland to take up some drafts which were out (R. 111-114).[2] No additional deposits were made in the Atlantic Export account, except one check on which payment was stopped (R. 114).

The two loads of Kottler's eggs were driven to New Jersey where they were loaded on to another truck and sent south (R. 134-142, 152, 156, 184). The

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[2] After Kottler's drafts were not paid, he received a telephone call from Smith and also spoke with "Pierce," who said the bank had insufficient funds but that they would bring the cash. They subsequently called back to say that they could not make connections. Kottler immediately reported the matter to the F.B.I. (R. 67-68).

driver of the first load identified Ivey, Price and Newlin, Jr., as the men who met him in New Jersey and directed the reloading of the eggs (R. 138-139). The eggs were delivered to the premises of one Cottone in Miami, where the drivers were paid by petitioner Locke using the name Smith (R. 156-157, 161-162).

About November 16, Newlin, Sr. had called Cottone to see whether he would purchase eggs which had been refused as an export order (R. 194-195). Cottone said he could not pay for the eggs until they were sold (R. 198-199). Newlin and Smith (petitioner Locke) came to Miami (R. 197-199) and Cottone gave Locke $400 in advance to pay the drivers (R. 200). Cottone collected $11,000 for the eggs (R. 224).

2. The government also produced evidence of similar transactions. (1) Newlin, Sr. and petitioner Locke (using the name Smith), as representatives of Ivey and Atlantic Export, arranged for the purchase of eggs from one Korbitz in Maine in October 1962. Checks for two shipments in October were paid, but checks given for two additional purchases in November 1962 did not clear and the eggs were never paid for (R. 257-263). (2) Newlin, Sr. and Locke purchased eggs from a processor and paid for them in drafts of Atlantic Export which were honored in October and November 1962. However, a draft in the amount of $1,560 for a purchase made on November 17, 1962, was never honored (R. 271-277). (3) Newlin, Sr., Locke, and Ivey made a purchase of frozen eggs from a man in Maine in October 1962,

giving him a draft which was not paid (R. 263-271). (4) An order placed by telephone with a North Carolina firm in November 1962 was received by Locke and Ivey, but the draft signed by Ivey for $2,940 was never paid (R. 281-285).

When petitioners objected to the admission of evidence with respect to one of these transactions, the judge instructed the jury that the evidence was being received only "for the purpose of indicating knowledge and intention and modus operandi or method of operation on the part of the defendant or defendants, if the jury finds that it has potency or relevancy along that line" (R. 267). In his final charge, the judge said (R. 300):

> I charge you that under the law evidence may be received of separate transactions distinct from those charged in the indictment if such separate transactions are similar in nature to those charged in the indictment and if they were committed by the same persons, the defendants, at or about the same time as the transactions charged in the indictment. Such evidence is admissible not for the purpose of convicting a defendant for a crime with which he is not charged; that would not be permissible, but for the limited purpose of determining his intent with respect to the matter charged in the indictment.

ARGUMENT

Evidence of similar acts, occurring close in point of time to the acts charged, was properly admitted as bearing on intent and mode of operation. *Nye &*

Nissen v. *United States*, 336 U.S. 613, 618. There is thus no issue warranting review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

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